SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924

No. 359

THE UNITED STATES, APPELLANT

vs.

ELMO R. ROYER

APPEAL FROM THE COURT OF CLAIMS

INDEX

1 In the Court of Claims

ELMO R. ROYER
v.
THE UNITED STATES
No. 34,193

I. *Petition. Filed September 3, 1919*

To the honorable the COURT OF CLAIMS:

The claimant, Elmo R. Royer, respectfully represents:

1. The claimant was an officer of the Medical Reserve Corps, United States Army, and as such was called into the service of the United States during the war between the United States and Germany.

2. While so serving in France as a first lieutenant of said Medical Reserve Corps, he was recommended by cablegram of August 5, 1918, of General John J. Pershing, commanding the American Expeditionary Forces in France, for promotion to major.

Said recommendation was duly received at the War Department, and was approved; and The Adjutant General of the Army announcing the orders of the Secretary of War, acting under the direction of the President, by cablegram dated September 23, 1918, announced and directed the appointment of the claimant with other officiers as majors in the Medical Corps.

The chief surgeon of the A. E. F., Brig. General Merritte W. Ireland, also under date of October 5, 1918, sent a telegram to the claimant, "You have been promoted major. Mail acceptance."

2 September 28, 1918, the claimant was officially notified by the chief surgeon of the American Expeditionary Forces in France of his promotion to major and requested to submit his letter of acceptance and oath of office to that office without delay, which claimant promptly did, immediately upon receipt of official notifications of his appointment on October 18, 1918.

3. He thereupon assumed the insignia and title of major and performed all the duties of that grade, and was paid as of the rank of major by the quartermasters having his accounts.

4. Long subsequently, however, he was informed that all these official actions had been erroneous. He protested against this statement and thereupon was informed by The Adjutant General of the Army, by order of the Secretary of War:

"The records of this office show that Major Elmo R. Royer, Medical Corps, was appointed as such September 23, 1918, per cable to General Pershing."

Notwithstanding his lawful appointment and promotion and performance of the duties of major, he was called upon to refund all differences of pay and allowances in excess of those of a captain from October 18, 1918, to February 16, 1919, upon which date a new commission as major was issued to him.

5. Claimant therefore claims the pay and allowances thus once paid to him and afterwards deducted from his pay, amounting to $240.19.

6. This claim is based among other statutes upon the provisions of the act of May 18, 1917, authorizing the President to increase temporarily the Military Establishment of the United States
3 (40 Stat. 76), as amended by the act of July 9, 1918 (40 Stat. 845), providing for appointments in the Army during the existing emergency.

No other action has been had on said claim in Congress or by any of the departments; no person other than the claimant is the owner thereof or interested therein; no assignment or transfer of this claim, or of any part thereof or interest therein, has been made; the claimant is justly entitled to the amount herein claimed from the United States, after allowing all just credits and offsets; the claimant has at all times borne true allegiance to the Government of the United States and has not in any way voluntarily aided, abetted or given encouragement to rebellion against the said Government. The claimant is a citizen of the United States. And the claimant claims two hundred and forty dollars and nineteen cents ($240.19).

KING AND KING,
Attorneys for Claimant.

[Jurat showing the foregoing was duly sworn to by Elmo R. Royer. Omitted in printing.]

4 II. *General traverse. Entered Nov. 4, 1919*

No demurrer, plea, answer, counterclaim, set-off, claim of damages, demand, or defense in the premises, having been entered on the part of the defendant, a general traverse is entered as provided by rule 34.

III. *History of proceedings*

On February 20, 1922, the case was argued and submitted on merits.

On April 3, 1922, the court filed findings of fact and conclusion of law and entered judgment for plaintiff in the sum of $240.19, with an *an* opinion by Hay, J., a concurring opinion by Graham, J., and a dissenting opinion by Downey, J.

On May 26, 1922, the defendant filed a motion for a new trial.

On June 5, 1922, the defendant's motion for a new trial was allowed.

IV. *Argument and submission*

On January 8, 1924, the case was argued and submitted on new trial by Mr. George A. King, for plaintiff, and Mr. John G. Ewing, for defendant.

V. *Order. Entered Jan. 28, 1924*

This case was argued by counsel for the respective parties and submitted on the 8th day of January, 1924. On consideration whereof the court makes and files its findings of fact, and concludes that under said facts the plaintiff is entitled to recover. It is therefore adjudged and ordered by the court that the plaintiff have and recover of and from the United States the sum of two hundred and forty dollars and nineteen cents ($240.19).

It is further ordered that the majority opinion heretofore filed in said cause and the dissenting opinion by Judge Downey stand.

5 VI. *Findings of fact, conclusion of law, opinion of the Court by Hay, J., and dissenting opinion by Downey, J. Entered January 28, 1924*

This case having been heard by the Court of Claims, the court, upon the evidence, makes the following

FINDINGS OF FACT

I

The plaintiff, Elmo R. Royer, was on and prior to August 5, 1918, serving in France as a first lieutenant of the Medical Reserve Corps on active duty.

II

On said 5th of August, 1918, Gen. Pershing, commanding the American Expeditionary Forces, sent a cablegram to the Chief of Staff in which he recommended the "following appointments in the Medical Reserve Corps to rectify inequalities in grade due to mistakes in original appointments":

"To be majors in Medical Reserve Corps, Captains Zabdiel B. Adams * * * [and 44 others] * * * To be majors, Medical Reserve Corps, First Lieutenants * * * Elmo R. Royer * * * [and 17 others] * * *."

This recommendation was referred to the Surgeon General of the Army, who on August 22, 1918, returned the same to The Adjutant General with the first indorsement thereon as follows:

"1. Recommending approval of the appointment of the following-named officers in the Medical Corps, U. S. Army, for the period of the existing emergency, with the rank of major: Captain Zabdiel B. Adams * * * [and 43 others].

"2. Recommending approval of the appointment of the following-named officers in the Medical Corps, U. S. Army, for the period of the existing emergency, with the rank of captain: First Lieutenants * * * Elmo R. Royer * * * [and 16 others].

"3. * * *.

"4. * * *.

"5. * * *.

6 "6. A vacancy exists for these appointments in the Medical Department per letter A. G. Feb. 5, 1918."

This recommendation of the Surgeon General was approved by order of the Secretary of War indorsed thereon.

III

On September 23, 1918, The Adjutant General cabled Gen. Pershing:

"Following first lieutenants appointed majors, Medical Corps: "* * * Elmo R. Royer * * *" [and 17 others].

On September 28, 1918, the Surgeon General's office in France notified the plaintiff as follows:

"1. I am directed by the chief surgeon to inform you that you have been commissioned major, Medical Corps, U. S. A., per cable No. A1973, War Department, 23 September, 1918.

"2. You are requested to submit your letter of acceptance and oath of office to this office without delay."

The plaintiff submitted a letter of acceptance and executed the oath of office on October 18, 1918. He assumed the insignia of rank of major, performed the duties appropriate to that office, and was so officially addressed.

IV

Thereafter, on November 21, 1918, The Adjutant General of the Army cabled the commanding general in France as follows:

"Referring to your subparagraph E, paragraph 1, cablegram No. 1559, recommending certain Medical Reserve Corps officers for promotion, and to paragraph 9, cablegram 1973, from this office, advising that the following-named first lieutenants had been appointed majors in the Medical Corps—

"* * * Elmo R. Royer * * * [and 17 others].

"you are advised that the cablegram from this office was in error in advising you of the appointment of these officers as majors.

"The records of this office show that these officers were recommended by the Surgeon General for appointment as captains and his recommendation approved by the Chief of Staff, and the above-mentioned officers were so appointed."

The first indorsement on this communication of November 21 was to the effect that by command of Gen. Pershing each of the officers named would assume his proper rank and make proper adjustment of pay overdrawn.

The second indorsement was as follows:

"It is recommended that inasmuch as these officers accepted their promotions to the grade of major in good faith and have drawn pay for such in good faith, that they be allowed to retain pay drawn as major up to the time of their acceptance of commission as captain."

The third indorsement was as follows:

"1. Although the officers referred to herein accepted their promotions to the grade of major in good faith and have drawn pay for such in good faith, there is no legal way in which they may be paid as major because of error in the cable. In other words, an acceptance of a commission as major when such commission was not issued would not constitute a valid claim for pay as major.

7 "2. It is requested that this office be furnished with latest address in the case of each of the officers mentioned herein in order that action may be taken toward having pay refunded on account of overpayment.

"By authority of the chief quartermaster."

At that time plaintiff was in a hospital. He was on October 18, 1918, in base hospital 44, then in base hospital 8, then in base hospital 35, consecutively until November 15, 1918, on which date he sailed for the United States with other casuals. He was not in France at the date of the order of November 21. After his return to the United States and while still in a hospital plaintiff received his first notice of the above-stated error.

On February 19, 1919, a communication dated American Expeditionary Forces, France, from the chief surgeon, to Capt. Elmo R. Royer stated:

"1. I am directed by the chief surgeon to inform you that you have been commissioned major, Medical Corps, U. S. A., per S. O. 48, par 88, G. H. Q., A. E. F., dated 17 February, 1919.

"2. You are requested to submit your letter of acceptance and oath of office to this office without delay."

This appointment is shown by the record to be a promotion from the rank of captain to that of major, with rank from February 17, 1919.

V

On January 7, 1919, the chief quartermaster addressed a communication to the plaintiff in base hospital 44, as follows:

"1. Hereto attached, for your information, is copy of letter, dated November 21, 1918, from The Adjutant General of *th* Army, together with 1st ind. of G. H. Q., A. E. F., dated December 17, 1918.

"2. In view of instructions contained therein, you will please refund either in cash or by deduction on your pay voucher the difference between the pay of major from date of acceptance of commission as such and pay of captain up to and including date last paid as major.

"3. Please return this communication with report of action taken."

When this came to the attention of plaintiff he replied on February 21, 1919, to the effect that he had been ordered to the United States and sailed November 15, 1918, and that he had taken the matter up with The Adjutant General's Office, Washington, for adjustment. The plaintiff's statement was to the effect that he had been appointed major with rank from September 23, 1918, as per cable from The Adjutant General. The Adjutant General stated on March 3, 1919,

that the records of his office showed that Maj. Elmo R. Royer, Medical Corps, was appointed as such September 23, 1918, per cable to Gen. Pershing.

The matter in due course reached The Adjutant General's office, which reached the conclusion * * *.

"3. This office adheres to its former views, that where, as in this case, the records disclose that Lieut. Royer was actually appointed captain, and erroneously notified that he was appointed major, he would not be entitled to the rank and pay of major. Having erroneously drawn the pay of major since October 18, 1918, he should be required to refund the difference."

8 VI

The plaintiff was paid as major from October 18, 1918, until the date of his reappointment in February, 1919. From the date of this reappointment in 1919 he was paid as major. At the date of his discharge, August 31, 1919, there was paid him on account of his pay and allowances as major the sum of $240.10 less than was due him.

The plaintiff had applied for a discharge, and on August 23, 1919, he was informed that he would not be permitted to take advantage of a leave of absence for purpose of discharge until he had made proper settlement of the claim of the Government; that he had been paid as major prior to February, 1919, instead of being paid as captain for that period, and that he should restore the difference between the pay of captain and the pay of major, that amount being $240.19. There was accordingly deducted from the amount due the plaintiff the said sum of $240.19, and this amount has never been restored or paid to him.

CONCLUSION OF LAW

Upon the foregoing findings of fact the court decides as a conclusion of law that the plaintiff is entitled to recover the sum of $240.19. It is therefore adjudged and ordered that the plaintiff recover of and from the United States the sum of two hundred and forty dollars and nineteen cents ($240.19).

OPINION

HAY, *Judge*, delivered the opinion of the court:

The plaintiff in the year 1918 was serving in France as a first lieutenant in the Medical Reserve Corps of the Army of the United States. On August 5, 1918, General Perishing by cable recommended that the plaintiff be promoted to the office of major in the Medical Reserve Corps. On August 22, 1918, the Surgeon General of the Army recommended that the plaintiff be appointed to the office of captain in the Medical Reserve Corps, which recommendation was approved by the Secretary of War. On September 23, 1918, The Adjutant

General of the Army cabled to General Pershing that the plaintiff had been appointed major, Medical Corps. On September 28, 1918, the plaintiff was notified by the chief surgeon of the American Expeditionary Forces that he had been commissioned major, Medical Corps, and the plaintiff was requested to submit his letter of acceptance and oath of office; the plaintiff accepted the commission and took the oath of office on October 18, 1918, and assumed the insignia of the rank of major, performed the duties of that rank, assumed its responsibilities, and was officially addresed as major. He was paid as a major from October 18, 1918, to the date of his discharge August 31, 1919.

On November 21, 1918, The Adjutant General of the Army stated in an official communication to General Pershing that there was an error in the cablegram appointing plaintiff as major, and that his appointment was as captain only. On December 17, 1918, it was ordered by competent authority that the plaintiff assume his proper rank and make proper adjustment of pay overdrawn. By an order of February 17, 1919, the plaintiff was again promoted to the rank of major. The plaintiff was not informed until February 19, 1919, that there had been a mistake in his first appointment as major. He was paid by the pay officers as major during his entire service from October 18, 1918, to the date of his discharge on August 31, 1919. At that time there was checked against him and deducted from his pay the sum of $240.19 as having been overpaid him from October 18, 1918, to February 16, 1919, in the rank of major over and above the pay of a captain.

The plaintiff claims that he was legally and regularly appointed to the rank of major, and that he held that office from the date of his acceptance and taking the oath of office on October 18, 1918, and therefore is entitled to the pay of a major. The evidence does not bear out the claim of the plaintiff that he was legally and regularly appointed to the rank of major. That claim is based upon the cablegram of General Pershing recommending the appointment, and the cablegram of The Adjutant General of the Army stating that the appointment had been made, but in the meantime and before the last cablegram had been sent the plaintiff had been appointed a captain by order of the Secretary of War. General Pershing was advised of the error made by The Adjutant General, and issued an order for its correction. The order so issued was not a revocation of the appointment of the plaintiff as major, for no such appointment had in fact been made. The Adjutant General in sending a cablegram had inadvertently misstated a fact; he had no power to make an appointment; he could only issue the notice of an appointment; and if he made a mistake in so doing, such action on his part could not have the effect of making an appointment. To say that it could would be to clothe The Adjutant General with powers which he does not possess under the law, and would in effect be conferring upon him powers which are lodged only in the hands of the President and the Secretary of War. It follows that the plaintiff can not main-

tain a suit in this court to recover the pay of a major for a period during which he did not legally hold the office of major.

In this case the plaintiff accepted the office of major in good faith; he took the oath of office with no knowledge that any mistake had been made in his promotion; he discharged the duties of the office; assumed its responsibilities, and rendered service to the Government as such officer during the time that it is now proposed his pay shall be taken from him. He was paid for his services in good faith by the officers of the Government charged with that duty. He was paid as major from October 18, 1918, to February 17, 1919, on which latter date he was regularly promoted to the office of major. He was paid as major from February 17, 1919, to August 31, 1919, and he was clearly entitled to be so paid, having been regularly appointed major on February 17, 1919.

The plaintiff supposed, and had a right to suppose, that he was in law and in fact a major and entitled to receive the pay of a major; he was paid in good faith by the officers having charge of the payment; all the parties concerned acted in good faith. The plaintiff having been ordered by competent authority to assume the rank of major, and having discharged the duties of that rank in good faith in time of war, and having been paid the emoluments of that rank in good faith by the officers who are intrusted with the duty of making such payments, he can not be required to return the money so received to the Government.

In the case of Miller v. United States (19 C. Cls. 338, 354) the court says:

"It has been repeatedly decided by courts of eminent and respectable authority that a de facto officer is entitled to fees or compensation, earned by him, while in discharge of the duties of his office which he held in good faith and not merely as a usurper."

This court in the case of Montgomery v. United States (19 C. Cls. 370, 376) held as follows:

"It is true the claimant was not a second lieutenant de jure during this time, but the President, who ordered him to service, supposed he was, and so he did. He was, however, an officer de facto, and this service was rendered in good faith. Having been paid only a fair compensation for services actually performed, he is under no legal obligation to return it."

See also Bennett v. United States (19 C. Cls. 379, 388) and Palen v. United States (19 C. Cls. 389, 394), where it is said:

"The claimant did actually perform the services attached to the office, and as it is not possible to correct the mistake on the one side by returning the services, so the mistake on the other side ought not to be corrected by compelling him to pay back the money which he had received in good faith, as the salary of an office held de facto by an error of law for which he was no more responsible than were the defendants."

The above-cited cases were not appealed from. The Supreme Court of the United States in the case of Badeau v. United States (130 U. S. 439, 452) says:

"But inasmuch as the claimant, if not an officer de jure, acted as an officer de facto, we are not inclined to hold that he has received money which, ex aequo et bono, he ought to return."

The plaintiff being entitled to the pay of a major at the date of his discharge was entitled to be paid the money due him as major, and he could not have been required, in the circumstances of this case, to return money which the Government claimed from him on account of money which it had overpaid him, such overpayment having been made prior to the time of his having been regularly appointed major on February 17, 1919. If the Government had set up this claim as a counter claim against the officer in this suit under the principles of the cases cited above, such a counterclaim could not be allowed.

Judgment will be entered for the plaintiff in the sum of $240.19. It is so ordered.

GRAHAM, *Judge;* BOOTH, *Judge;* and CAMPBELL, *Chief Justice,* concur.

DOWNEY, *Judge,* dissenting:

I shall not discuss the principle upon which I predicate my dissent from the conclusion of my associates at a length commensurate with its importance, for, while I deem lengthy discussion unnecessary, the importance of the principle is hardly to be overstated. It is not limited to the result of this case, for it must control a class of cases, and, as it is sustained or otherwise is there preserved or destroyed an established, recognized, and necessary governmental system as old almost as the Government itself.

The plaintiff, it is rightly said, was not a major during the period from October 18, 1918, to February 17, 1919. It is not held in the majority opinion and, in my judgment, could not be held, if of any importance, that he was a major de facto. He was a captain and became a major by subsequent promotion to rank as such from February 17, 1919. He was paid during this period while a captain the pay of a major, $240.19 more for the period than the captain's pay which he was entitled to receive, and afterwards, from his pay as a major after he became in fact a major, this excess payment made to him while a captain was deducted.

The majority opinion says with undoubted correctness that he could not sue in this court for a major's pay when not a major. He in fact sues, as stated in the fifth paragraph of his petition, for "the pay and allowance once thus paid to him and afterward deducted," etc., referring undoubtedly to the excess of major's pay paid to him when a captain, apparently just such a suit as the court has said he could not maintain. But the court treats the action as one for recovery of money due him as a major and deducted to reimburse an overpayment made when a captain. I do not care to take issue with the

court's adoption of this view of the case which, seemingly, can amount to little more than the attempted attaching of an identity to money paid and money withheld while the principle must remain the same. It is said in concluding the majority opinion that "the plaintiff, being entitled to the pay of a major at the date of his discharge was entitled to be paid the money due him as major, and he could not have been required, in the circumstances of this case, to return money which the Government claimed from him on account of money which it had overpaid him, such overpayment having been made prior to the time of his having been regularly appointed major on February 17, 1919."

The circumstances of the case for consideration are, of course, the facts of the case. The inference, attempting to interpret the language with fairness, is that there is a certain dividing line in an officer's accounts, predicated upon his rank, behind which you may not go in the adjustment thereof. Or in other words that, serving in one rank, his pay in that rank, when earned, is immune from checkage or deduction because of an indebtedness to the Government accruing in a lesser rank. Such or any similar distinction seems to me wholly unwarranted and subversive of the established governmental right of deduction.

It is conceded that there was an overpayment to the plaintiff and, being an overpayment of a statutory salary, it was an illegal payment. The United States had a right to recover it. Having in its hands funds due the plaintiff by way of after accrued salary, it had a right to recover it by a deduction therefrom. That the overpayment was made before the plaintiff in fact became a major, but was in fact a captain and was entitled to be paid only as a captain, and was deducted from pay due him after he became a major, is wholly immaterial. The account was open. Such an account is never a closed account until separation from the service. There is no barrier erected between the accounts of an officer as a captain and his accounts as a major, after promotion, back of which you may not go for purposes of adjustment. The situation is the same whether he was overpaid before or after he became a major.

This checkage or deduction to reimburse the United States for an overpayment to one of its officers was not only a right of the United States but it was the duty of the proper officers to resort thereto in the protection of governmental interests to the end that money improperly paid to an officer be recovered and proper reimbursement made. No other theory can possibly work out a proper settlement of pay accounts between the Government and its officers. In no other way, in many instances, could the Government be protected against illegal payments and the retention of their fruits by the recipient. Lawsuits, even if efficacious, should not be a necessary resort when the Government has within its own hands the means for expeditious and just settlements. The Supreme Court has commended the practice because of its avoidance of "multiplicity of suits and circuity of action."

There are authorities cited in the majority opinion. The presumption must be from their citation that they are relied on as sustaining the conclusion reached. I refer simply to the fact that they all treat of de facto officers, whatever their merits may be otherwise. In each quotation in the majority opinion, presumably the applicable gist of the case, reference is made to an officer de facto, and the controlling influence of that assumed status is strongly indicated in the short quotation from the Badeau case in which the Supreme Court used the very significant word "inasmuch," a word full of meaning in the connection used.

In other classes of transactions where the relations of the parties in the circumstances may seem to offer more room for objection to the practice than in a case such as this, the practice of deduction has met with emphatic approval by the highest authority, the accounts being held to be open, and it may be said, referring thereto in the language of some of the older cases, that "the practice of set-off where one party is both debtor and creditor" has prevailed for so long that one hesitates to attempt to state its origin. Judge Richardson, one of the able former judges of this court, writing more than forty years ago, referred to it as a practice which had prevailed "from an early day" and as "sustained by judicial decision as legal and proper without any express statute on the subject." It is hardly conceivable that it is now, as a rule of recognized procedure, to be impaired or abandoned.

I regard it as unnecessary to quote from or discuss in detail the authorities. (See United States v. Burchard, 125 U. S. 176, 181; Gratiot v. United States, 15 Pet. 336; Wisconsin Central R. R. Co. v. United States, 164 U. S. 190, and cases cited; Bonnafon v. United States, 14 C. Cls. 484, 489; Taggart v. United States, 17 C. Cls. 322, 327; Howes v. United States, 24 C. Cls. 170, 185; Baxter v. United States, 32 C. Cls. 75–81–2; Grand Trunk Ry. Co. v. United States, 252 U. S. 112, 121.)

VII. *Judgment of the Court*

At a Court of Claims held in the city of Washington on the twenty-eighth day of January, A. D. 1924, judgment was ordered to be entered as follows:

The court, upon due consideration of the premises, find in favor of plaintiff, and do order, adjudge, and decree that the plaintiff, as aforesaid, is entitled to recover and shall have and recover of and from the United States the sum of two hundred and forty dollars and nineteen cents ($240.19).

VIII. *Petition for appeal*

From the judgment rendered in the above-entitled cause on the 28th day of January, 1924, in favor of plaintiff, the defendant, by the Attorney General, on the 31st day of March, 1924, makes appli-

cation for, and gives notice of, an appeal to the Supreme Court of the United States.

ROBERT H. LOVETT,
Assistant Attorney General.

Filed March 31, 1924.

IX. *Order allowing appeal*

It is ordered by the court this 7th day of April, 1924, that the defendant's application for appeal be and the same is allowed.

Entered April 7, 1924.

14 In Court of Claims

[Title omitted.]

I, F. C. Kleinschmidt, assistant clerk, Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the argument and submission of case; of the findings of fact, conclusion of law, opinion of the court by Hay, J., and the dissenting opinion by Downey, J.; of the judgment of the court; of the application of defendant for an appeal to the Supreme Court of the United States; of the order of the court allowing said application for appeal.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Washington City this tenth day of April, A. D. 1924.

[SEAL.] F. C. KLEINSCHMIDT,
Assistant Clerk Court of Claims.

[Indorsed on cover: File No. 30,273. Court of Claims. Term No. 359. The United States, appellant, vs. Elmo R. Royer. Filed April 15th, 1924. File No. 30,273.]

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